

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

JAMES MARTIN SANCHEZ,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

F077517

(Super. Ct. No. F05900315-3)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of mandate. Gregory T. Fain,
Judge.

James Martin Sanchez, in pro. per., for Petitioner.

No appearance for Respondent.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General,
Daniel B. Bernstein and Kathleen A. McKenna, Deputy Attorneys General, for Real
Party in Interest.

-ooOoo-

* Before Poochigian, Acting P.J., Smith, J. and DeSantos, J.

Petitioner challenges a postconviction order denying his motion for DNA testing made pursuant to Penal Code¹ section 1405.

BACKGROUND

On May 24, 2007, petitioner was sentenced to 31 years to life for oral copulation of a child under the age of 14, digital penetration of a child under the age of 14, sexual penetration of a child under the age of 14, assault with intent to commit oral copulation, assault with intent to commit a lewd or lascivious act, assault with intent to commit rape, forcible lewd act upon a child under the age of 14, and false imprisonment.

Petitioner's conviction was affirmed in case No. F052964 (*People v. James Martin S.* (July 21, 2008, F052964) [nonpub. opn.]).

In 2017, petitioner filed a motion for appointment of counsel pursuant to section 1405.

On March 24, 2017, the court appointed counsel.

On December 20, 2017, counsel for petitioner filed a motion for DNA testing. The motion requested that DNA tests be performed on the victim's "underwear, jeans, shirt, and the sweatpants provided by a neighbor for the alleged victim to wear after she ran into the street with no clothing on except a shirt," any specimens taken at the hospital, including the victim's urine sample, and any other evidence that could contain biological material. The prayer for relief also requested that the court initiate an investigation regarding what evidence still exists that can be tested for DNA.

The superior court did not order a response from the district attorney, did not order an investigation to determine if any evidence still existed that could be tested for DNA evidence, and denied the motion because, "There has not been a sufficient showing of how the requested DNA testing would raise a reasonable probability that the convicted

¹ All statutory references are to the Penal Code.

person's verdict would be more favorable if the DNA testing had been available.”
(Unnecessary capitalization omitted.)

This petition for writ of mandate was filed on May 22, 2018.

On May 29, 2018, this court issued an order directing the Attorney General to file an informal response which addressed, in addition to the other issues, whether the superior court applied an inappropriate standard and whether it would be appropriate to issue peremptory relief. (*Palma v. U. S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180-181.)

The informal response was filed on June 21, 2018, and petitioner's informal reply was filed on July 6, 2018.

On November 20, 2018, this court issued an alternative writ directing the trial court to either: (1) vacate its order, reconsider the motion in light of the reasons given by this court in its order, and thereafter enter a new order either granting or denying petitioner's motion; or (2) show cause before this court why a peremptory writ of mandate granting such relief should not issue.

On December 5, 2018, the superior court filed a motion vacating its prior order, reconsidered petitioner's motion and denied it without ordering any investigation into whether the evidence pertinent to the offense still existed and was in a condition to be tested.

This court granted petitioner leave to file a supplemental informal reply. The reply was filed on December 31, 2018.

DISCUSSION

Section 1405 provides in pertinent part:

“(b)(3)(A) Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA

testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.” (§ 1405, subd. (b)(3)(A), emphasis added.)

Section 1405 expressly places a duty upon appointed counsel to investigate whether a motion for DNA testing should be filed. Section 1405 also requires that the motion for DNA testing be granted if:

“The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.” (§ 1405, subd. (g)(1).

The above provisions of section 1405 required appointed counsel to conduct an investigation to determine what evidence was still in existence that could be tested for DNA. The investigation could at a minimum have consisted of inquiries sent to the pertinent police agencies, the office of the district attorney, the hospital where the victim was examined and the doctor who examined her, requesting information regarding what evidence was still in existence and whether it was in a condition that would permit DNA testing. If the inquiries were refused or unsuccessful, such circumstances would have provided grounds to support a request that the trial court order an investigation into what pertinent evidence was still in existence.

The motion filed pursuant to section 1405 did not mention that any inquiries were made. The motion states in pertinent part:

“But was the evidence really lost? Or is it reposing in a hospital laboratory or police evidence locker? Did the prosecutor and the police department make a concerted search for biological evidence that almost certainly was taken from the child, given the protocol surrounding the treatment of sexual assault victims? Defendant cannot prove that swabs were taken of the child’s genital area, where defendant allegedly touched and licked her, because defendant does not have the police power of the state to issue subpoenas, investigate laboratories, search evidence lockers, or ferret through chain of evidence logs.”

We conclude that no investigation was attempted prior to filing the motion as required by section 1405 regarding whether the whether the victim’s clothes, urine

sample, a rape kit and the sweatpants were collected, still in existence and in a condition to be tested for DNA.

No responses to the motion were filed by the “Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested.” (§ 1405, subd. (d)(2).)

Petitioner is entitled to appropriate relief. (Code Civ. Proc., § 1085; see *Whitney's at the Beach v. Superior Court* (1970) 3 Cal.App.3d 258, 266.) A peremptory writ of mandate is proper and should issue. (Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.*, *supra*, 36 Cal.3d at pp. 180-181; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 697.)

DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its order filed on December 5, 2018, in Fresno County Superior Court action No. F05900315-3, to cause appointed counsel to make appropriate investigatory attempts consistent with this opinion, to cause counsel to file in that action a supplemental pleading summarizing those efforts and results, to reconsider the motion and supplemental pleading and thereafter render such rulings as the superior court considers appropriate.

Insofar as petitioner requests additional relief, the petition is denied.

This court notes that any subsequent petition for writ of mandate or prohibition filed in this court pursuant to Penal Code section 1405 may incorporate by judicial notice the contents of this action to avoid petitioner having to file additional copies.